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(Exempt from filing fee pursuant to 38 U.S.C. §4323(h)(1))

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL LIEN-PINO,

Plaintiff,

-v-

BARRY'S BOOTCAMP SAN DIEGO LLC, and

DOES 1 through 100, inclusive,

Defendants.

Case No. '11CV0269 H BLM

COMPLAINT FOR:

1. Discrimination under 38 U.S.C., §4301 *et seq.*;
2. Discrimination under California Military and Veterans Code §394;
3. Tortious Discharge in Violation of Public Policy.

DEMAND FOR JURY TRIAL

F. R. Civ. P. Rule 38

1. Plaintiff, Michael Lien-Pino ("Plaintiff"), by his undersigned attorney, brings this civil action and alleges as follows:

I. INTRODUCTION

2. This civil action is brought pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 - 4335 ("USERRA").

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to 38 U.S.C. § 4323(b).

1 4. Venue is proper in this district under 38 U.S.C. § 4323(c)(2) because defendant
2 Barry's Bootcamp San Diego, LLC ("Bootcamp") maintains a place of business within this judicial
3 district. Moreover, venue is proper in this district under 28 U.S.C. § 1391(b) because the events
4 giving rise to this lawsuit occurred in this judicial district.

5
6 **III. INTRADISTRICT ASSIGNMENT**

7 5. The events giving rise to plaintiff's claim occurred in substantial part in San Diego
8 County.

9
10 **IV. PARTIES**

11 6. During his employment with Bootcamp, plaintiff resided in Lemon Grove, California,
12 in San Diego County, within the jurisdiction of this Court.

13 7. Bootcamp maintains a place of business at 1220 Cleveland Ave., Ste M-109, San
14 Diego, California, in San Diego County, within the jurisdiction of this Court, and is an employer
15 within the meaning of 38 U.S.C. § 4303(4)(A).

16 8. The true names and capacities, whether corporate, associate, individual or
17 otherwise, of Defendants Does 1 through 100, inclusive, are unknown to Plaintiff who sues
18 these Defendants by such fictitious names. On information and belief, each of the Defendants
19 designated as a Doe 1 through 100 is legally responsible for the events and happenings
20 referred to in this pleading, and unlawfully caused the injuries and damages to Plaintiff as
21 alleged in this pleading. Plaintiff will seek leave of court to amend this pleading to show the
22 true names and capacities when the same have been ascertained.

23 9. At all times herein relevant, Defendants and Does 1 through 100, whether
24 fictitiously named or otherwise, and each of them, were the agents, partners, joint venturers,
25 representatives, servants, employees, alter ego, successors-in-interest, co-conspirators and
26 assigns, each of the other, and at all times relevant hereto were acting within the course and
27 scope of their authority as such agents, partners, joint venturers, representatives, servants,
28 employees, successors, co-conspirators and assigns, and that all acts or omissions alleged

1 herein were duly committed with the ratification, knowledge, permission, encouragement,
2 authorization and consent of each Defendant designated herein, and legally responsible to
3 Plaintiff for the acts and omissions of each other.

4
5 **V. FACTUAL ALLEGATIONS**

6 10. Plaintiff commenced his employment with Bootcamp on or about October 1, 2010
7 as a front desk attendant.

8 11. Plaintiff is a member of the United States Army Reserve ("Army Reserve").

9 12. On or about October 25, 2010, plaintiff gave verbal notice to Shmulik Sharon
10 ("Sharon"), a manager at Bootcamp, that he had been ordered to report for mandatory
11 training at airborne school, from November 18, 2011 to December 13, 2011. Sharon responded
12 that the training was an inconvenience for Bootcamp.

13 13. On or about December 12, 2011, plaintiff telephoned Sharon. Plaintiff told Sharon
14 that plaintiff would be graduating on December 13, 2011 and coming back on the same day.
15 Sharon then told plaintiff that he had no "available hours" for plaintiff but that he would
16 inform plaintiff once he had "available hours."

17 14. During the next month, plaintiff telephoned Sharon once per week asking Sharon if
18 there were any "available hours" for plaintiff to work.

19 15. On January 12, 2011, plaintiff went to Bootcamp and asked Sharon about "available
20 hours" for plaintiff to work. Sharon responded that plaintiff's military training was an
21 inconvenience and that Bootcamp has already hired a plaintiff's replacement. Plaintiff then
22 asked if Bootcamp could rehire plaintiff. Sharon told plaintiff that he would let plaintiff know in
23 two days. The next day Sharon sent an e-mail to plaintiff stating that plaintiff would not be
24 rehired.

25 16. On or about January 14, 2011, plaintiff sent a text message to Sharon stating that
26 plaintiff was advised to pursue legal action if not rehired. Sharon never responded.

27 **FIRST CAUSE OF ACTION**

28 **Discrimination under 38 U.S.C., §4301 et seq.**

(By plaintiff against all defendants)

17. Plaintiff refers to each and every preceding paragraph and incorporates those paragraphs as though set forth in full in this cause of action.

18. 38 U.S.C. §4301 sets forth USERRA'S express intent in that "[t]he purposes of this chapter are (1) to encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; ... and (3) to prohibit discrimination against persons because of their service in the uniformed services."

19. 38 U.S.C. §4311(a) states, "person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

20. 38 U.S.C. §4311(b) provides: "An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter ... or (4) has exercised a right provided for in [same]."

21. There are no exhaustion requirements or administration remedies required under USERRA, 38 U.S.C. §4323 (a)(2)(A).

22. In addition, 20 CFR Part 1002, page 72546, requires that the provisions of USERRA are "to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." See also, 20 CFR 1002.7 ("USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.").

23. Plaintiff has given defendants proper notice of his military service.

24. PLAINTIFF reported to work within USERRA's statutory time frame.

1 25. Defendants' failure to provide benefits of employment violated the rights afforded
2 plaintiff under USERRA, 38 U.S.C. §§4301, *et. seq.*

3 26. Defendants' acted voluntarily, deliberately and willfully in its violation of USERRA.

4 27. Defendants, deprived plaintiff of his rights, privileges and immunities which were
5 clearly established at the time defendants acted herein and defendants knew or should have
6 known that its conduct would violate these rights, privileges and immunities. Defendants acted
7 with the intent to deprive the plaintiff of his rights, privileges and immunities by purposely and
8 intentionally failing to abide by USERRA.

9 28. As a legal result of the above-described conduct of defendants, plaintiff suffered
10 incidental, consequential, liquidated and/or special damages, and will sustain attorneys' fees
11 and costs in an amount according to proof.

12 **SECOND CAUSE OF ACTION**

13 **Discrimination under California Military and Veterans Code §394**

14 **(By plaintiff against all defendants)**

15 29. Plaintiff refers to each and every preceding paragraph and incorporates those
16 paragraphs as though set forth in full in this cause of action.

17 30. Plaintiff brings this claim under California state law with federal court jurisdiction
18 being conferred by 28 U.S.C. § 1367(a).

19 31. California Military & Veterans Code §394 provides that no person shall discriminate
20 against any enlisted member of the military or naval forces of the United States because of
21 that I membership. Section 394 also provides that no employer or person shall discharge any
22 person from employment because of the performance of any ordered military duty, or
23 prejudice or harm him in any manner in his employment, position, or status by reason of
24 performance of military service or duty.

25 32. Defendants' conduct, as alleged herein above, constitutes a violation of §394.

26 33. As a direct and proximate result of the conduct of defendants as set forth in this
27 count, plaintiff has suffered injuries and damages including but not limited to, loss of past and
28

1 future earnings, loss of past and future benefits, all to his damage in an amount that has yet to
2 be ascertained, according to proof.

3 34. As a further direct result of the conduct of defendants as set forth in this count,
4 plaintiff suffered emotional distress including but not limited to, depression, frustration, anger,
5 loss of self worth, and humiliation, all to his damage in an amount that has yet to be
6 ascertained, according to proof.

7 35. Defendants' acts as herein before described were committed maliciously,
8 fraudulently or oppressively with the intent of injuring plaintiff, and/or with a willful and
9 conscious disregard of plaintiff's right to be free of workplace discrimination. Because these
10 acts were carried out by officers, directors and/or managing agents of defendants in a
11 despicable, deliberate and intentional manner, plaintiff is entitled to recover punitive damages
12 under California Civil Code §3294.

13 36. Pursuant to California Military and Veterans Code §394(g), plaintiff requests an
14 award of attorney fees against defendants, and each of them.

15
16 **THIRD CAUSE OF ACTION**

17 **Tortious Discharge in Violation of Public Policy**

18 **(By plaintiff against all defendants)**

19 37. Plaintiff refers to each and every preceding paragraph and incorporates those
20 paragraphs as though set forth in full in this cause of action.

21 38. Plaintiff brings this claim under California state law with federal court jurisdiction
22 being conferred by 28 U.S.C. §1367(a).

23 39. Both the California Military and Veterans Code §394, which makes violations
24 thereof a misdemeanor, and USERRA, 38 U.S.C. §§4301 et seq., express the public policy of
25 prohibiting discriminating against members of the uniformed services because of such status
26 and/or participation in military service, by taking adverse employment actions against such
27 persons.
28

1 f. for attorney fees;

2 g. for all costs of suit; and

3 h. for such other and further relief as the Court deems just and proper.

4
5
6 Dated: February 7, 2011


Georgiy S. Lyudyno
Attorney for Plaintiff

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, plaintiff demands a trial by jury.

Dated: February 7, 2011


Georgiy B. Lyudyno
Attorney for Plaintiff

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

MICHAEL LIEN-PINO

(b) County of Residence of First Listed Plaintiff San Diego

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Georgiy B. Lyudyno, 4050 3rd Ave., #413, San Diego, CA 92103
619 717 2079**DEFENDANTS**BARRY'S BOOTCAMP SAN DIEGO LLC, and
DOES 1 through 100, inclusiveCounty of Residence of First Listed Defendant San Diego

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known)

'11CV0269 H BLM

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

38 U.S.C. §§ 4301 - 4333 28:1391

Brief description of cause:

Employment discrimination/ termination on military status

VII. REQUESTED IN COMPLAINT:☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

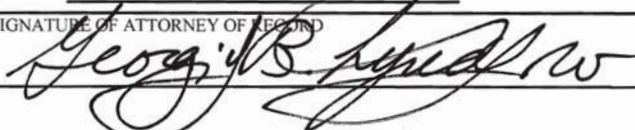
JUDGE

DOCKET NUMBER

DATE

02/06/2011

SIGNATURE OF ATTORNEY OF RECORD



FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____